#### **Before the**

# MONTGOMERY COUNTY COMMON OWNERSHIP COMMISSION Montgomery County, Maryland

## In the Matter of

| Michael A. Sauri              | X |                       |
|-------------------------------|---|-----------------------|
| 18520 Reliant Drive           | X |                       |
| Gaithersburg, MD 20879,       | X |                       |
| Complainant,                  | X |                       |
|                               | X |                       |
| <b>v.</b>                     | X | <b>Case No. 715-O</b> |
|                               | X | July 13, 2005         |
| Estate at Pope Farms HOA      | X |                       |
| c/o Raymond B. Via, Jr., Esq. | X |                       |
| Linowes and Blocher, LLP      | X |                       |
| Suite 800                     | X |                       |
| 7200 Wisconsin Avenue         | X |                       |
| Bethesda, MD 20814,           | X |                       |
| Respondent.                   | X |                       |

### **DECISION AND ORDER**

The above-entitled case having come before the Commission on Common Ownership Communities for Montgomery County, Maryland, pursuant to §§ 10B-5(i), 10B-9(a), 10B-10, 10B-11(e), 10B-12, and 10B-13 of the Montgomery County Code, 1994, as amended, and the Commission, having considered the testimony and evidence of record, finds, determines and orders as follows:

#### **Background**

On or about June 29, 2004, a complaint was filed with the Office of Common Ownership Communities on behalf of Dr. Michael Sauri, owner of 18520 Reliant Drive, Gaithersburg, Maryland (Complainant) against Estate at Pope Farms Homeowners

Association (Respondent). Dr. Sauri's complaint alleged, on his own behalf and on the behalf of some number of other homeowners in the Estate at Pope Farms Homeowners Association community who are similarly situated, that the Association had refused to maintain shared driveways as a common expense as is required by § 8.2 of the Declaration of Covenants, Conditions and Restrictions applicable to the community. The other homeowners who were purported to join in the complaint were named on a list attached to the complaint.

On behalf of the Association a Response was filed in which it was conceded that repair and maintenance of the shared driveways is the responsibility of the Association but that the Declaration also provides for variable rates of assessment at § 5.6 of the Declaration. As a procedural matter, the Association alleged that the complaint was filed without notice to the Association or any attempt to resolve the issues prior to incurring the costs of this case.

Inasmuch as the matter was not resolved through mediation, this dispute was presented to the Commission on Common Ownership Communities for action pursuant to § 10B-11(e) of the Montgomery County Code on January 5, 2005, and the Commission accepted jurisdiction. A hearing was scheduled for March 16, 2005. A continuance was requested by counsel for the Association and the hearing was rescheduled for April 27, 2005 and was held on that date. The record was left open since counsel offered additional testimony from the original developer regarding the amendment to the declaration and indicated that they wanted to supplement closing argument. More than 60 days has elapsed from the date of the hearing and the record has not been supplemented.

#### **Findings of Fact**

Estates at Pope Farms Homeowners Association includes four sections developed separately. In two of these sections, there are approximately six driveways shared by 28 unit owners. Use of these driveways is shared by several homeowners but ownership of the shared sections is allocated to individually owned parcels. Some or all of them also have greenspace which is separated from the houses by driveway but is divided and owned by lot owners rather than as common area.

Dr. Sauri was one of the earliest purchasers in this community. At the time he first considered purchasing a lot the salesperson showing him the lot described the shared driveway and greenspace as a new concept in development. Dr. Sauri closed on his property in May 2001.

A number of other owners in this community who are similarly situated purportedly have asked to join this case. They have not been added as parties to the action. The construction of the community documents in this case will apply to all of the shared driveways and greenspaces.

The Association claims that the Complainants filed this action without notice to the Association or other effort to resolve this issue internally. The record includes correspondence on behalf of the owners of shared driveway units with the Association and Board meeting minutes indicating that the Association was aware of the unresolved dispute regarding maintenance and repairs for the shared driveways. While the manager for the Association indicated that the Association had not determined to not maintain the driveways, the unrefuted evidence in the record indicates that the Association provided snow removal and salting through the winter of 2002 and then stopped providing those services.

Counsel for the Association, in a letter to counsel for Complainant dated April 5, 2004, had extended an offer of having the Association take responsibility for the maintenance and repair of the driveways and having the expenses allocated to the shared driveway homeowners in non-uniform assessments. This offer was apparently not accepted.

The Declaration of Covenants, Conditions and Restrictions for the Estates at Pope Farm Homeowners Association, as originally adopted, included the following, quoted in relevant part:

Sections 8.2 "Association Maintenance" The Association shall maintain and keep in good order the Common Area (and any improvements or facilities situated thereon), such maintenance to be funded as provided herein. Provided, however, that certain portions of the Common Area may, at the discretion of the Board of Director [sic], be left in a natural condition, in which case no maintenance will be performed by the Association. In addition, the Association may maintain and keep in good repair rights-of-way, cul-de-sacs, berms and associated landscaping, entry strips and entrance features or improvements, whether owned as part of a Lot or dedicated for public use, so long as such rights-of-way, entry strips and entrance features or improvements are within or appurtenant to the Project. This obligation shall include, but not be limited to, maintenance, repair and replacement, subject to any insurance then in effect, of all landscaping and other flora, structures and improvements situated upon such areas. The expenses of such maintenance shall be a Common Expense of the Association, including, but not limited to, reserves for the maintenance, repair or replacement of any such property or improvements. The Association shall also maintain any portion of any Lot which it is obligated to maintain pursuant to any easement or other agreement.

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The Association may, in the discretion of the Board of Directors, assume additional maintenance responsibilities upon all or any portion of the Property. Without limiting the generality of the foregoing, the Association may, by resolution of the Board of Directors, elect to provide maintenance to all or a portion of Shared Driveways of the mailboxes in

the Project. In such event, all costs of such maintenance shall be assessed only against those Owners residing within the portion of the Property receiving the additional services. This assumption of responsibility may take place either by contract or because, in the opinion of the Board, the level and quality of service then being provided is not consistent with the Community-Wide Standard of the Project. The provision of services in accordance with this Section shall not constitute discrimination within a class.

The Association shall also have the right to enter any Lot, including the dwelling unit located on such Lot, without the consent of the Owner and/or occupant thereof, to conduct any repairs as are necessary for the maintenance and protection of the Common Areas, any Lot and the Lawn and Garden Areas. The costs of such repairs shall be collectible from the Owner of such Lot in the same manner as assessments as provided in Article 5 herein.

...

In an amendment to the Declaration, filed with the land records on September 7, 2000, before Dr. Sauri purchased his unit, the last two paragraphs quoted immediately above, were amended and restated, in relevant part, as follows:

The Association shall maintain, repair and replace, as deemed necessary in the sole discretion of the Association's Board of Directors, the Shared Driveways within the Property. The expenses for the maintenance, repair and replacement of the Shared Driveways shall be a Common Expense of the Association.

The Association may, in the discretion of the Board of Directors, assume additional maintenance responsibilities upon all or any portion of the Property. In such event, all costs of such maintenance shall be assessed only against those Owners residing within the portion of the Property receiving the additional services. This assumption of responsibility may take place either by contract or because, in the opinion of the Board, the level or quality of service then being provided is not consistent with the Community-Wide Standard of the Project. The provision of services in accordance with this Section will not constitute discrimination within a class.

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Additionally, at Section 5.6, "Variable Rate of Assessment", the Declaration states:

The Board of Directors may, from time to time, establish by resolution nonuniform [sic] rates of assessments for Lots within the Property to

reflect the estimated level of benefit that such Lots have or will receive from services provided by the association. Such rates shall be based on projected or actual costs incurred by the Association relating to the operation and maintenance of the Property. For example, and for purposes of illustration only, the Association may assess Lots benefited by Shared Driveways at a different rate than other Lots to reflect the different level of benefit received by the Owners of the Shared Driveway Lots due to services the Association may elect to perform to the Shared Driveways. The imposition of non-uniform rates of assessment shall rest solely at the discretion of the Board of Directors. In the event the actions or activities of any Owner (or occupant of such Owner's Lot) causes or results in increased expenses for the Association, the Board of Directors may assess such increase in expenses against such Owner and his Lot. Such assessment shall be a lien against the Owner's Lot and is collectible pursuant to the procedures set forth in this Declaration.

Counsel for Dr. Sauri called Mr. Charles Sullivan, Vice President of Classic Community Corp., the developer, but not the builder, of Estate at Pope Farms to testify regarding the meaning of the Declaration. Mr. Sullivan testified that the original Declaration was drafted by the previous developer. He requested that the attorney for Classic Community Corp. draft the revised version of Section 8.2 and had it filed with the county land records. He testified that he had made the change at the request of the builders and that he intended greater flexibility for the Association. Since none of the purchasers had the benefit of this information or the opportunity to negotiate the terms of the Declaration, Mr. Sullivan's intent is irrelevant to the construction of the Declaration.

During the hearing it was apparent that Dr. Sauri is arguing that both the shared driveways and the shared greenspaces should be maintained by the Association. Additionally, at least one of the driveways has required a significant repair. There was limited testimony regarding this damage but it appeared that it may have been a matter that should have been attended to by the developer.

### **Discussion**

The language of the amended and restated Section 8.2 clearly requires the Association to "maintain, repair and replace" the shared driveways. Any ambiguity arises in the language, "as deemed necessary in the sole discretion of the Association's Board of Directors." It would seem from the testimony of Mr. Sullivan at the hearing that this language was intended to give the Association's Board of Directors flexibility to assume this responsibility or not. It is an instance in which Association documents are structured to give the Board of Directors authority but not responsibility. This effort frequently, as in this instance, fosters disputes within a community.

The reasonable construction of the provision as a whole is that the Association is responsible for the services necessary to maintain, repair and replace the shared

driveways in accordance with the standards of the community. This is also the most reasonable management approach for all home buyers in this kind of ownership arrangement. It assures the purchaser that the driveways will be maintained reasonably and that the individual homeowners will not have to make arrangements to have the work done or to collect the cost from neighbors without the assessment authority vested in the Association, as Dr. Sauri has done, in order to be sure that their driveways will be clear and safe. The costs of services for the driveways are to be common expenses of the Association, allocated and subject to the authority vested in the Association for collection of assessments.

The Association does have the authority to levy a variable or non-uniform assessment for services included in the common expenses which benefit some homeowners more than others and may use this authority for the services provided to homeowners with shared driveways. The non-uniform assessment should proportionately reflect only the impact of the additional costs for services for the shared driveways.

Since the Association is responsible for the shared driveways it should take responsibility for resolving the financial responsibility for the repair of the rutted driveway. If this was a correction which should have been made by the developer and it is not too late to seek compensation for the repair, the Association should do so.

The shared greenspaces are not so clear. The Association has authority but no responsibility for the management of privately owned lawn and garden areas under language in Section 8.2 which is not quoted above. There was not much testimony at the hearing regarding the problems in managing the shared greenspaces. We recommend that the Board of Directors, manager and the homeowners who own shared greenspace meet and discuss the issues involved in managing these spaces and come to agreement. We further suggest that the terms of that agreement be memorialized in writing and made available with the community documents to potential purchasers of lots that include such property. This agreement may be revisited from time to time with all of the parties should that seem appropriate. The Association can undertake the care of these spaces at some additional cost to the property owners or the property owners can care for this part of their plots themselves, with the understanding that if this space is neglected so that it falls below the community standard, the Association may undertake maintenance. It seems likely that the cost of caring for one owner's part of one of these spaces may have more per capita cost impact than including the maintenance of any one of these areas as part of the normal community grounds maintenance.

#### **Conclusions of Law**

This is a matter in which the Declaration must be construed to determine its legal effect rather than interpreted in accordance with the meaning intended by the parties. As with all common ownership community documents, this contract does not reflect negotiations between the parties resulting in a meeting of minds; there is no privity between the parties. A developer provided community documents which were adopted

with some amendments by another developer for a community in which the houses were built and sold to the eventual owners by builders. The homeowners received the documents when they purchased their units and accepted the terms in those documents when they took title to the property. Thus, to the extent possible, the Declaration should be construed in accordance with its plain meaning.

The Declaration provision regarding the shared driveways as amended does not suffer from significant ambiguity. It has a reasonably clear meaning. Tools of construction are only used when construing language sufficiently ambiguous to require outside reference.

As to the greenspaces, the Association has the authority but not the responsibility unless the owner of one or more shared greenspace neglects to tend to it in accordance with community standards. If the greenspaces are neglected the Association may be responsible for maintenance with the authority to charge the homeowner for the cost of so doing.

#### ORDER

The Association is responsible for maintaining, repairing and replacing the shared driveways as a common expense of the Association. To the extent that the owners of the shared driveway units may benefit more from these services than other owners in the Association it may be so reflected in a variable or non-uniform assessment against those properties.

The Association shall assist in determining whether the driveway repairs performed to date were necessitated by initial faulty installation by the developer and assist the affected homeowners in trying to collect from the developer if this is the case and it is not untimely or otherwise not possible.

The Association shall pay the homeowners who have undertaken to have the shared driveways maintained and repaired to date the amounts greater than the fair share for that lot and shall collect balances due from benefiting homeowners to the extent records are available to document what has been spent and how much has been repaid by whom.

The Association shall distribute a copy of this decision to all homeowners in the next general distribution after it becomes final.

Panel members Nadene Neel and Vicki Vergagni have concurred in the foregoing decision and order.

Any party aggrieved by this action of the Commission may file an administrative appeal to the Circuit Court of Montgomery County, Maryland, within thirty (30) days

| from the date of this Order, pursuant to administrative appeals. | o the Maryland Rules of Procedure governing |
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|                                                                  | Dinah Stavana Danal Chairmanan              |
|                                                                  | Dinah Stevens, Panel Chairwoman             |
|                                                                  | Commission on Common Ownership              |
|                                                                  | Communities                                 |